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3 **UNITED STATES DISTRICT COURT**  
4 **DISTRICT OF NEVADA**

5 BOIVAE FLEMING,

Case No. 2:20-cv-01983-RFB-EJY

6 Petitioner,

7 v.

**ORDER**

8 WARDEN HUTCHISON, et al.,

9 Respondents.

10 Following the Notice of Appearance (ECF No. 13) by the Federal Public Defender on  
11 behalf of Petitioner Boivae Fleming, **IT IS HEREBY ORDERED:**

- 12 1. The Federal Public Defender, through Emma L. Smith, Esq., is appointed as  
13 counsel for Petitioner pursuant to 18 U.S.C. § 3006A(a)(2)(B). Counsel will  
14 represent Petitioner in all federal proceedings related to this matter, including any  
15 appeals or certiorari proceedings, unless allowed to withdraw.
- 16 2. Petitioner will have until September 30, 2021, to file an amended petition and/or  
17 seek other appropriate relief. This deadline and any extension thereof may not be  
18 construed as implied findings regarding the federal limitation period or a basis for  
19 tolling. Petitioner at all times remains responsible for calculating the running of  
20 the federal limitation period and timely asserting claims, without regard to  
21 any court-ordered deadlines or extensions. Thus, a petition or amended petition  
22 filed within a court-ordered deadline may still be dismissed as untimely if it violates  
23 the statute of limitations. See Sossa v. Diaz, 729 F.3d 1225, 1235 (9th Cir. 2013).
- 24 3. Respondents must file a response to the amended petition, including potentially by  
25 motion to dismiss, within **60 days** of service of an amended petition. Petitioner  
26 may file a reply within **30 days** of service of the answer. However, LR 7-2(b)  
27 governs the response and reply time to any motion filed by either party, including  
28 motions filed in lieu of a pleading.

- 1           4. Any procedural defenses Respondents raise to the counseled amended  
2           petition must be raised together in a single, consolidated motion to  
3           dismiss. Successive motions to dismiss will not be entertained, and any procedural  
4           defenses omitted from the consolidated motion to dismiss will be  
5           waived. Respondents may not file a response that consolidates their procedural  
6           defenses, if any, with their response on the merits. But arguments that an  
7           unexhausted claim clearly lacks merit may be included a procedural-defense  
8           response. If Respondents seek dismissal of unexhausted claims under 28 U.S.C.  
9           § 2254(b)(2) they must: (1) do so in a single motion to dismiss, not in the answer;  
10          and (2) specifically direct their argument to the standard for dismissal  
11          under § 2254(b)(2) as set forth in Cassett v. Stewart, 406 F.3d 614, 623–24 (9th Cir.  
12          2005). In short, no procedural defenses, including exhaustion, may be included  
13          with the merits in an answer. All procedural defenses, including exhaustion, must  
14          be raised in a single motion to dismiss.
- 15          5. In any answer filed on the merits, Respondents must specifically cite to and address  
16          the applicable state court written decision and state court record materials, if any,  
17          regarding each claim within the response as to that claim.
- 18          6. Respondents must file the state court exhibits relevant to their response in  
19          chronological order.
- 20          7. All state court records and related exhibits must be filed in accordance with LR  
21          IA 10-3, LR IC 2-2, and LSR 3-3, and include a separate index identifying each  
22          exhibit by number or letter. The index must be filed in CM/ECF’s document  
23          upload screen as the base document to receive the base docket number (*e.g.*, ECF  
24          No. 10). Each exhibit must then be filed as “attachments” to the base document to  
25          receive a sequenced sub-docket number (*e.g.*, Exhibit A (ECF No. 10-1), Exhibit B  
26          (ECF No. 10-2), Exhibit C (ECF No. 10-3), and so forth). If the exhibits will span  
27          more than one filing, the base document in each successive filing must be either a

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1 copy of the index or volume cover page. *See* LR IC 2-2(a)(3)(A).

- 2 8. Notwithstanding LR IC 2-2(g), paper copies of any electronically filed exhibits—  
3 for this case—need not be provided to chambers or to the staff attorney, unless later  
4 directed by the court.

5 DATED this 2<sup>nd</sup> day of July 2021.

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8 RICHARD F. BOULWARE, II  
9 UNITED STATES DISTRICT JUDGE  
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